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No. 10-497

IN THE
Supreme Court of the United States

FRANCIS GATIMI, JANE GATIMI, & COLLINS GATIMI,
Petitioners,

v.

ERIC H. HOLDER, JR.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker Drive
Suite 3500
Chicago, IL 60601-1692
(312) 782-3939
bjmurray@jonesday.com

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Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS

"'Providing an award of fees [under the EAJA] to a prevailing party represents one way to improve citizen access to courts and administrative proceedings.'" *Commissioner, INS v. Jean*, 496 U.S. 154, 165 n.14 (1990) (quoting the EAJA's legislative history). As the petition demonstrated, this Court's review is urgently needed to resolve two square conflicts among the circuit courts concerning aspects of the EAJA. These questions are of critical importance in leveling the playing field between individuals with limited resources, on the one hand, and the United States government, on the other. The Court's resolution of either or both of these questions could thus impact thousands of administrative and judicial proceedings in this country.

Arguing that no conflict exists, Respondent misconstrues this Court's precedent as well as the administrative and Seventh Circuit's decisions in this case. Respondent also raises vehicle objections that are irrelevant to the questions presented by the petition. In all, nothing in the opposition brief reconciles the Seventh Circuit's two erroneous holdings with contrary approaches taken by other circuit courts, or provides any reason for this Court to put off bringing order to this chaos.

For the reasons stated here and in the petition, this Court's review is essential to ensure that the EAJA continues to improve access to the courts for those otherwise least able to afford it. The petition for a writ of certiorari should be granted.

I. BY EXCLUDING THE IJ'S DECISION (WHICH THE BIA DID NOT ADDRESS) FROM THE DEFINITION OF "THE POSITION OF THE UNITED STATES," THE SEVENTH CIRCUIT SQUARELY DEPARTED FROM OTHER CIRCUITS.

The Seventh Circuit's erroneous holding that issues resolved by the IJ and unaddressed by the BIA must be excluded from the EAJA analysis is squarely in conflict with decisions of other circuits. Pet. 8-12. In *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005), for example, the court held that the EAJA's term "position of the United States" includes not only the government's "litigation position," but also "the underlying agency decision rendered by the BIA or an IJ." The court further explained, "the manner in which responsibilities are divided within the executive branch is immaterial to determining what the statutory language requires." *Id.* The Court should grant the petition to resolve this circuit split.

Respondent argues that no conflict exists because (1) "the Board and the government's lawyer rejected" the IJ's past persecution analysis (Opp. 8 (quoting Pet. App. 38a)), (2) "the rationale of an immigration judge is not part of the agency action under review unless the Board adopts or otherwise incorporates that reasoning" (Opp. 11), and (3) *Thangaraja* dealt with the BIA's summary affirmance without an opinion (Opp. 11-12). But none of these reasons resolves the conflict. Instead, each either relies on an incorrect understanding of the procedural posture of this case, or misconstrues the nature of the circuit split.

First, the BIA did not "reject" the IJ's past persecution analysis. In full, the BIA's discussion on that point was as follows: "we find that the lead respondent failed to meet his burden of proof for asylum, *even if he established that his past harm amounts to persecution*." Pet. App. 16a (emphasis added). The BIA did not say that the lead respondent (Mr. Gatimi) in fact established past persecution. Instead, it assumed away this issue for purposes of the argument, concluding that the issue did not matter because Mr. Gatimi did not meet the remaining requirements for asylum. *See id.* The past persecution issue thus remained in dispute when the case arrived at the Seventh Circuit.

Second, because the BIA had not rejected the IJ's past persecution finding, Petitioners could not ignore it in briefing before the Seventh Circuit. When the BIA's decision merely supplements the IJ's, "the IJ's opinion, as supplemented by the BIA's opinion, becomes the basis for [Seventh Circuit] review." *Liu v. Ashcroft*, 380 F.3d 307, 311 (7th Cir. 2004). Respondent does not mention *Liu*, which Petitioners cited (Pet. 9), instead mistakenly claiming that "Petitioners cite no . . . authority" of this sort (Opp. 11). Since the Seventh Circuit could have reached the issue of past persecution, Petitioners' counsel (as any prudent counsel would have done) briefed it. Pet. 9. Otherwise, the Seventh Circuit could have affirmed the IJ on that ground, potentially resolving a dispositive argument against Petitioners without having the benefit of Petitioners' argument.

Respondent also suggests, citing *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam), that the Seventh Circuit could not have addressed the IJ's past

persecution analysis and would have been required to remand for the BIA to address it in the first place. Opp. 10-11. Not so. As the Seventh Circuit had explained in a different case, "we do not agree that *Ventura* stands for the broad proposition that a court of appeals must remand a case for additional investigation or explanation once an error is identified." *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004). Instead, "the issue in *Ventura* was whether [an appellate court] impermissibly usurped the BIA's fact-finding role." *Id.* When, as here, an issue requires no new fact-finding, appellate courts can rule on the IJ's determination, even if not adopted by the BIA. *See id.*

It may be that the Seventh Circuit would have declined to rule on the past persecution issue and would have remanded so that the BIA could first make that determination. Or it might not have. But the important point here is that the Seventh Circuit *could have* addressed it without the BIA's input. And therefore, Petitioners could not ignore the issue, but instead had to expend resources in briefing it as part of their Seventh Circuit proceedings.

Finally, because Petitioners could ill afford to ignore the past persecution finding in their Seventh Circuit briefing, this case is in all relevant respects squarely at odds with the Ninth Circuit's decision in *Thangaraja*. Respondent argues that the distinction between the two cases lies in *Thangaraja*'s procedural posture, where the BIA issued no opinion, instead summarily affirming the IJ's decision. Opp. 11-12. But that is a distinction without a difference. In both cases, asylum applicants sought Article III appellate court review and addressed in their briefs

IJs' decisions. In both cases, the applicants struggled to find valuable resources to litigate against the government's positions that lacked substantial justification. That is why the EAJA protects the applicants in both cases by shifting to the government the cost of its unreasonable positions. As the Ninth Circuit recognized, "the manner in which responsibilities are divided within the executive branch [*e.g.*, between IJs and the BIA] is immaterial to determining what the statutory language requires." *Thangaraja*, 428 F.3d at 874. And, to distinguish the two cases as Respondent proposes to do here would resurrect "for the average person the financial disincentive to challenge unreasonable governmental actions"—precisely the disincentive the EAJA is intended to eliminate. *Jean*, 496 U.S. at 163.

Along the same lines, Respondent misses the point when he tries to address the tension between the Seventh Circuit's holding and those of the Second, Third, Fifth, and Tenth Circuits by claiming "[n]o such tension exists." Opp. 12 n.2. The tension is plainly there because, unlike the Seventh Circuit, those others recognize that the term "position of the United States" includes *all* "underlying agency misconduct giving rise to the suit." *E.g.*, *Perales v. Casillas*, 950 F.2d 1066, 1073 (5th Cir. 1992); *see also* Pet. 12 (citing other circuits' similar holdings). This underlying misconduct includes misconduct at the IJ level, provided that the BIA does not expressly cure it by rejecting the IJ's erroneous analysis. Had the Seventh Circuit followed this approach, it would have considered the IJ's analysis in determining whether the government's position was substantially justified. But the court did not, in tension with the Second,

Third, Fifth, and Tenth Circuits, and squarely in conflict with the Ninth Circuit.

The Court should resolve this square conflict.

II. THE SEVENTH CIRCUIT'S APPROACH TO ANALYZING WHETHER THE GOVERNMENT WAS "SUBSTANTIALLY JUSTIFIED," TREATING EACH ISSUE IN A VACUUM WITHOUT ANALYZING ITS IMPACT ON THE OVERALL CASE, EXACERBATED AN ALREADY-EXISTING CIRCUIT SPLIT.

The Seventh Circuit's denial of Petitioners' request for EAJA fees exacerbated a second well-established circuit conflict concerning when the government's position is not "substantially justified," a statutory prerequisite for an award of EAJA fees. Pet. 12-17. Before this case, on the one hand, the Fourth, Fifth, and Eleventh Circuits would grant a full EAJA award if the position of the United States was only partly justified. *See Russell v. Nat'l Mediation Bd.*, 775 F.2d 1284, 1291-92 (5th Cir. 1985); *Haitian Refugee Ctr. v. Meese*, 791 F.2d 1489, 1500, *vacated in part on other grounds*, 804 F.2d 1573 (11th Cir. 1986); *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993); Pet. 13-15. The Ninth Circuit, on the other hand, would allocate the EAJA award when the government's position is only partly justified. *See United States v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996); Pet. 16. To what was already a two-way split, the Seventh Circuit in this case added a third dimension by erroneously denying fees *in their entirety* because the government was substantially justified on what it viewed as the more "prominent" of the two issues in the case. That

approach is squarely at odds with the approaches used in other circuits. On this issue, too, this Court's guidance is urgently needed.

Respondent tries to unify the three divergent approaches, to no avail. To begin with, Respondent downplays parts of the other circuits' approaches that contradict Respondent's theory by calling them "dicta." Opp. 14, 16. But they are not. The part of *Russell* that Respondent labels "apparent dicta" (Opp. 14) is one of that case's holdings: "We *hold* that in computing Russell's attorney fees on remand, the district court should consider the time spent presenting the entire case," which includes time spent challenging the government's substantially justified positions. 775 F.2d at 1292 (emphasis added). So, too, Respondent erroneously labels "dicta" (Opp. 16) the *Rubin* court's explanation—constituting a part of its *reasoning*—that "[t]here may well be situations in which the government is justified initially but its subsequent unjustified actions merit an award of attorney's fees for the unjustified portion." 97 F.3d at 375. And in any event, a subsequent Ninth Circuit decision cites *Rubin* in analyzing the EAJA fee award in a case where an initially justified position becomes unjustified in the course of litigation. *See United States v. 22249 Dolorosa Street*, 190 F.3d 977, 982 (9th Cir. 1999). Respondent's only answer to *Dolorosa* is to call it a case "involv[ing] only one legal issue," thus not implicating the allocation question. Opp. 16 n.3. But that is misleading because, as demonstrated above, *Dolorosa* involved a mixture of justified and unjustified positions. That both related to the same "legal issue" is irrelevant to the question of what to do with EAJA fees in cases where the

government's position is justified only in part. Respondent cannot demonstrate lack of conflict by labeling conflicting portions as "dicta" and pretending they do not matter. And more generally, as the petition and the brief in opposition both demonstrate, the field here is simply not as clear as Respondent attempts to portray it. *See, e.g.*, *Nken v. Holder*, 385 F. App'x 299, 302-03 (4th Cir. 2010) (per curiam) (allocating an EAJA award without even acknowledging that the court's earlier approach in *Roanoke* would justify awarding EAJA fees in full).

But even if Respondent were correct in his presentation (and he is not), Respondent's arguments would still demonstrate a conflict between the Seventh Circuit and all other courts to apply the substantial-justification analysis. As Respondent's own brief frames the discussion, the conflict would be between the Seventh Circuit's substantial-justification approach, which analyzes substantial justification by treating each issue in a vacuum, and the approach of all other circuits, which all take their cue from this Court's decision in *Jean* and consider each issue's effect on the case as a whole. Respondent agrees (Opp. 13), as he must, that this Court's decision in *Jean* requires a single determination whether "the position of the United States" is substantially justified. 496 U.S. at 161-62. Each case must be treated "as an inclusive whole, rather than as atomized line-items." *Id.* And Respondent further argues that other circuits' decisions faithfully apply *Jean*'s holding. For example, the Fourth Circuit explained that "a more egregious example of misconduct might, even if confined to a narrow but important issue, taint the government's 'position' in the entire case as

unreasonable." *Roanoke*, 991 F.2d at 139. Similarly, "a broader government position that, considered in a vacuum, would not be clearly egregious might still, in the overall context of the case, constitute an unreasonable position because of its impact." *Id.*

But even under this analysis, *Jean* and other circuits are clear: for purposes of analyzing the "substantial justification" issue, the government's position on each issue is not to be taken in a vacuum, but must be analyzed in light of its impact on the case as a whole. Overall context matters a great deal. That is where the Seventh Circuit, contrary to Respondent's argument, again goes its own way. Of the two issues that the Seventh Circuit addressed, it concluded that the "social-visibility issue was the more prominent issue and the government's position on that issue was substantially justified." Pet. App. 43a. The court "therefore conclude[d] that the government's position was substantially justified as a whole." *Id.* That analysis thus simply weighed the issues in the case against one another (albeit on a scale whose metric is far from objectively-verifiable). It did not even attempt to consider the impact of the less "prominent" issue (Mrs. Gatimi's fears of being subjected to female genital mutilation ("FGM") upon return to Kenya) on the case as a whole. Had the court considered that impact, it would have recognized that the issue of Mrs. Gatimi's fear of FGM, if resolved correctly by the BIA, would have resulted in the grant of asylum, obviating the need for Petitioners to seek the Seventh Circuit's review. Pet. 15. Performing instead the kind of line-item analysis rejected by *Jean* and other circuits, the Seventh Circuit erred as a matter of law and exacerbated an existing circuit split. Pet. 16.

Thus, even Respondent's (misguided) analysis shows only that the Seventh Circuit's approach represents legal error and contradicts the approach of all other circuits to have considered the issue of substantial justification. That is still a square circuit split.[1] Whether analyzed as Respondent or Petitioners frame it, this conflict, too, is real and warrants this Court's review.

III. THE PETITION PRESENTS A FULLY-VETTED VEHICLE FOR RESOLVING BOTH QUESTIONS PRESENTED AND ENSURING THAT THE EAJA CONTINUES TO ALLOW INDIVIDUALS TO CHALLENGE ERRONEOUS ACTIONS BY THE GOVERNMENT.

Finally, as the petition demonstrated, this case presents a well-suited vehicle for resolving both questions presented. Pet. 17-19. The issues are fully vetted and, their resolution being critically important to individuals and families seeking immigration relief, these issues potentially affect thousands of administrative and judicial proceedings in this country.

Respondent sees this case as "a poor vehicle" (Opp. 16-18), but it is his reasons, and not the vehicle, that

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[1] And because the split implicates legal error, Respondent's citation to the abuse-of-discretion standard of review is misleading. Opp. 12 (citing *Pierce v. Underwood*, 487 U.S. 552, 557-63 (1988)). A court "by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). This Court's review of the Seventh Circuit's approach to resolve this circuit split would thus be *de novo*.

are lacking. *First*, Respondent highlights a point that Petitioners readily acknowledged in the petition—the "Seventh Circuit initially did not address allocation because the Gatimis did not ask for it, requesting a full award instead." Pet. 17 n.2; Opp. 17. Aside from the fact that Petitioners did ask for allocation at the earliest practicable time (Pet. 17 n.2), they did not have to do even that because courts typically construe requests for 100% of fees as subsuming requests for anything in between zero and 100%. *See, e.g., CEMS, Inc. v. United States*, 65 Fed. Cl. 473, 483-85 (2005). And besides, the allocation issue is at best tangential to the second question presented in the petition, which deals with the Seventh Circuit's approach to the threshold issue whether the government's overall position is substantially justified. Petitioners illustrated the allocation approach of the Ninth Circuit only to demonstrate a three-way circuit split. On the merits, however, Petitioners plan to argue that the correct approach is that of the Fourth, Fifth, and Eleventh Circuits, which allow recovery of all fees if the government is substantially justified on less than all issues.

Second, Respondent argues that the Seventh Circuit erred in holding that the government was not substantially justified on the issue of Mrs. Gatimi's fear of FGM. Opp. 17-18. This argument comes too late. The government did not cross-petition for reconsideration on this part of the Seventh Circuit's opinion. Moreover, the argument has nothing to do with this petition because neither of the two questions presented depends on whether the Seventh Circuit erred in concluding that the government was not substantially justified on the FGM issue. *Cf. Yee*

v. City of Escondido, 503 U.S. 519, 535 (1992) ("[W]e ordinarily do not consider questions outside those presented in the petition for certiorari."). The court's conclusion on that issue is taken as correct (as it must be) for purposes of this petition.

In sum, Respondent's arguments notwithstanding, this petition remains a well-suited vehicle for resolving both questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brian J. Murray
Counsel of Record
JONES DAY
77 West Wacker Drive
Suite 3500
Chicago, IL 60601-1692
(312) 782-3939
bjmurray@jonesday.com

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Counsel for Petitioners